Habeeb Nashtar a/l Abdul Mutalif v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–445 OF 2010
SULAIMAN DAUD, SYED AHMAD HELMY AND MOHTARUDIN BAKI JJCA
25 MAY 2012

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Dangerous drugs — Trafficking in — Appeal — Appellant's conduct of not showing any sign of anxiety or attempting to run — Evidence of prosecution's witnesses and appellant's cautioned statements — Whether proper to support appellant's defence of innocent carrier — Inference of knowledge — Manner in which proscribed drugs was concealed in stainless steel flasks — Whether deduction of knowledge erroneous — Whether error affecting core of prosecution's case and thus, fatal to prosecution's case — Whether trial judge correct in concluding that prima facie case of trafficking had been made out by prosecution at close of prosecution's case — Whether challenge by defence unmeritorious — Whether conviction safe

The appellant herein was appealing to this court against his convicted and death sentenced for the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The thrust of the appellant's submission was that upon a proper evaluation of the prosecution's evidence as corroborated by the cautioned statements in exhs D74–D75, supported the appellant's defence of an innocent carrier. In amplification, the position taken by the appellant was that his conduct showed that he was an innocent carrier. He did not show any sign or anxiety or attempt to run. There was no evidence in the prosecution's case to show that he was in a state of fright. He was normal throughout the time he was confronted by the custom's officers right up to the time of his arrest. In this case, the trial judge held that the appellant had physical custody and control of the proscribed drugs found in the three stainless steel flasks marked as exhs P6, P12 and P13. The finding of custody and control of the drugs was based on the fact that the appellant collected the two boxes (exhs P5 and P11, where the steel flasks were recovered from), the baggage tags on the boxes (exhs P42–P43) which bore the name of the appellant, the flight number, flight destination, date and reference number. The same particulars were found on the portion of the baggage tags (exhs P59–P60). The name appearing on the baggage tags and boarding pass was the same as found in the appellant's passport. Further, it was the appellant who pushed the trolley on which he placed the two boxes, P5 and P11, after retrieving same from the baggage conveyor belt and the appellant was the person who placed the boxes in the scanning machine. There was no other person who was seen together with the appellant. Having found custody and

control, the learned trial judge applied the statutory presumption of knowledge under s 37(d) to arrive at her conclusion of possession.

Held, dismissing the appeal, affirming the conviction and sentence of the High Court:

(1) Although the deduction of the learned trial judge on the inference of knowledge was based on the manner in which the proscribed drugs was concealed in the stainless steel flasks were erroneous, nevertheless it does not necessarily follow that just because the proscribed drugs was so well hidden it must follow that he has knowledge. The error aforesaid was not fatal to the prosecution's case as it does not affect the core of the prosecution's case. This was because there was a statutory presumption of knowledge under s 37(d) as applied by the learned trial judge to establish possession (see para 16).

(2) The argument of the conduct of the appellant in not showing any sign of anxiety or attempting to run goes towards negativing knowledge is at best neutral as the place where the appellant was apprehended was a restricted area where there was no opportunity to escape. Further, the quantity of the drugs being 12,133g clearly leads to the inference that it was not intended for personal consumption. Hence, the trial judge was correct in her conclusion that a prima facie case of trafficking had been made out by the prosecution at the close of the prosecution's case (see paras 17–19).

(3) The evaluation of the defence by the learned trial judge and the totality of the evidence presented at the close of the defence satisfied the maximum evaluation standard required. In approaching the question of maximum evaluation of particular importance is not the label but rather the substance. The factual matrix herein satisfied that the learned trial judge did conduct a maximum evaluation through her in depth and thorough consideration and analysis of the evidence presented before arriving at her findings (see para 26).

(4) There was no error made by the learned trial judge in the appreciation of the evidence presented before her. She was entitled to make the findings of fact which she did for certain reasons given by her. Hence, there was no room or reason for appellate interference. The challenge by the defence was unmeritorious and the conviction was safe (see para 27).

[Bahasa Malaysia summary

Perayu merayu ke mahkamah terhadap sabitan kesalahan dan hukuman mati yang dijatuhkan ke atasnya bagi kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Asas hujahan perayu adalah bahawa apabila penilaian yang sepatutnya dibuat ke atas bukti pendakwaan seperti yang disokong oleh pernyataan beramaran dalam eksh D74-D75, menyokong pembelaan perayu sebagai pembawa tidak bersalah. Ini

ditambah lagi dengan kedudukan yang diambil oleh perayu adalah bahawa kelakuannya menunjukkan bahawa dia adalah pembawa yang tidak bersalah. Dia tidak menunjukkan sebarang tanda atau kebimbangan atau cuba untuk melarikan diri. Tiada bukti dalam kes pendakwaan untuk menunjukkan bahawa dia berada dalam keadaan takut. Dia bertindak normal sepanjang masa ketika berhadapan dengan pegawai kastam sehinggalah masa dia ditangkap. Dalam kes ini, hakim bicara memutuskan bahawa perayu mempunyai jagaan dan kawalan fizikal ke atas dadah tersebut yang ditemui dalam tiga termos keluli tahan karat yang ditandakan sebagai eksh P6, P12 dan P13. Dapatan jagaan dan kawalan dadah adalah berdasarkan fakta bahawa perayu mengumpul dua kotak (eksh P5 dan P11, yang mana termos keluli telah diperolehi daripadanya), tag-tag bagasi pada kotak-kotak (eksh P42-P43) yang terdapat nama, nombor penerbangan, destinasi penerbangan tarikh dan nombor rujukan perayu. Butir-butir yang sama telah ditemui pada bahagian tag bagasi (eksh P59-P60). Nama yang terdapat pada tag bagasi dan pas masuk (boarding pass) adalah sama seperti yang terdapat dalam pasport perayu. Selain itu, perayu merupakan orang yang menolak troli di mana dia meletakkan dua kotak, P5 dan P11, selepas mendapatkan semula yang sama daripada *conveyor belt* bagasi dan perayu juga orang yang meletakkan kotak di mesin imbasan. Tiada orang lain yang telah dilihat bersama-sama dengan perayu. Setelah membuat dapatan jagaan dan kawalan, yang arif hakim bicara telah mengguna pakai anggapan statutori pengetahuan di bawah s 37(d) untuk membuat kesimpulan bagi milikan.

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Walaupun dapatan yang arif hakim bicara mengenai inferens pengetahuan adalah berdasarkan cara di mana dadah tersebut disembunyikan dalam termos keluli tahan karat adalah salah, namun ia tidak semestinya bermaksud bahawa hanya kerana dadah tersebut telah tersembunyi dengan begitu baik, dia mempunyai pengetahuan akannya. Ralat yang dinyatakan sebelum ini tidak menjejaskan kes pendakwaan kerana ia tidak menjejaskan asas kes pendakwaan. Ini adalah kerana terdapat anggapan statutori pengetahuan di bawah s 37(d) seperti yang diguna pakai oleh hakim perbicara untuk membuktikan milikan (lihat perenggan 16).

(2) Hujahan bahawa perilaku perayu tidak menunjukkan sebarang tanda-tanda kebimbangan atau cuba untuk melarikan diri cenderung ke arah menegatifkan pengetahuan adalah sebaiknya neutral kerana tempat di mana perayu telah ditahan adalah kawasan terhad di mana tidak ada peluang untuknya melarikan diri. Di samping itu, kuantiti ubat 12,133g jelas membawa kepada inferens bahawa ia tidak dimaksudkan untuk kegunaan peribadi. Oleh itu, hakim bicara adalah betul dalam

kesimpulannya bahawa kes prima facie pengedaran telah dibuat oleh pihak pendakwaan pada penutup kes pendakwaan (lihat perenggan 17–19).

(3) Penilaian pembelaan oleh hakim bicara dan keseluruhan keterangan yang dikemukakan pada penutup pembelaan memenuhi tahap penilaian maksimum yang diperlukan. Dalam mendekati persoalan pernilaian maksimum yang menjadi kepentingan tertentu bukanlah label tetapi isinya. Fakta matriks dalam kes ini dipenuhi bahawa hakim bicara tidak menjalankan penilaian maksimum melalui pertimbangannya yang mendalam dan teliti dan analisis bukti-bukti yang dikemukakan sebelum membuat keputusannya (lihat perenggan 26).

(4) Tiada kesilapan yang dibuat oleh hakim bicara dalam mempertimbangkan bukti yang dikemukakan di hadapan beliau. Beliau berhak untuk membuat penemuan fakta yang mana telah dilakukannya atas sebab-sebab tertentu yang diberikan. Oleh itu, tidak ada ruang atau sebab untuk campur tangan rayuan. Cabaran oleh pihak pembelaan adalah tidak bermerit dan sabitan adalah selamat (lihat perenggan 27).]

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2012) paras 481–669.

Cases referred to

Mohamad Radhi bin Yaakub v PP [1991] 3 MLJ 169, SC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2)

Appeal from: Criminal Trial No45–12 of 2009 (High Court, Pulau Pinang)

(Karpal Singh & Co) for the appellant.
(Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Syed Ahmad Helmy JCA:

[1] The appellant was convicted and sentenced to death for the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the Act. The charge against the appellant reads as follows:

> Bahawa kamu pada 19.3.2009, lebih kurang jam 10.50 malam, alamat Unit Khas Pemeriksaan Penumpang, Balai Ketibaan Terminal Lapangan Terbang Antarabangsa Bayan Lepas, di dalam daerah Barat Daya, dalam negeri Pulau

Pinang, telah mengedar dadah berbahaya itu ketamine seberat 12,133.00 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum bawah Seksyen 39B(2) Akta yang sama.

[2] The appellant lodged an appeal against his conviction and sentence to the Court of Appeal. Upon reading the appeal record and after hearing the submissions both oral and written by respective counsels for the appellant and the respondent we dismissed the appeal and affirmed the conviction and sentence meted out by the High Court. Our reasons for doing so are as follows:

[3] We do not propose to regurgitate the facts of the case which was well set out in the judgment of the learned trial judge.

[4] Learned counsel for the appellant advanced only one ground of appeal namely that the learned trial judge erred in failing to evaluate the evidence of the prosecution's witnesses and the appellant's cautioned statements marked as exhs D74 and D75 tendered during the prosecution's case.

[5] The thrust of the appellant's counsel submission is that upon a proper evaluation of the prosecution's evidence as corroborated by the cautioned statement's in exhs D74 and D75 supports the appellant's defence of an innocent carrier.

[6] In amplification, the position taken by the appellant is that his conduct shows that he was an innocent carrier. He did not show any sign or anxiety or attempt to run. There is no evidence in the prosecution's case to show that he was in a state of fright. He was normal throughout the time he was confronted by the custom's officers right up to the time of his arrest.

[7] In support of his submission learned counsel referred to the case of *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316 for the proposition that a cautioned statement of an accused could be used at the stage of the prosecution's case to exonerate the accused.

[8] The error in essence is occasioned by the failure of the trial judge to adhere to the mechanism as laid down by the case of *Mohamad Radhi bin Yaakub v Public Prosecutor* [1991] 3 MLJ 169 which states:

> We are of the view that whenever a criminal case is decided on the basis of truth of the prosecution's case as against the falsity of the defence story, trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263go one step

further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution's case.

[9] To ascertain whether the *Radhi's* directive was adhered to and applied by the learned trial judge would involve an appraisal of her written grounds of judgment which is to be found at pp 525–561 of the appeal record.

[10] At the outset we wish to state that it is not incumbent for the sitting judge to make or record a finding of a prima facie case at the close of the prosecution's case. It is sufficient for the judge to give her reasons in the written grounds for requiring the appellant to make his defence — see *Mohamad Radhi's*'s case.

[11] Adverting to the learned trial judge's written grounds she stated that based on her findings she was satisfied that the prosecution has proven a prima facie case warranting the calling of the defence — see para 78 at p 550 of the appeal record.

[12] Now, what are the findings that the learned trial judge made that led her to conclude that a prima facie case has been made out?

[13] From her analysis of the prosecution's evidence she found that the appellant had physical custody and control of the proscribed drugs found in the three stainless steel flask marked as exhs P6, P12 and P13. The finding of custody and control of the drugs was based on the fact that the appellant collected the two boxes in exhs P5 and P11 (where the steel flasks was recovered from), the baggage tags on the boxes (exhs P42 and P43) which bore the name of the appellant, the flight number, flight destination, date and reference number. The same particulars are found on the portion of the baggage tag (exhs P59 and P60). The name appearing on the baggage tags and boarding pass is the same as found in the appellant's passport.

[14] The other piece of evidence which the trial judge based her finding was the fact that it was the appellant who was the person who pushed the trolley on which he placed the two boxes P5 and P11 after retrieving same from the baggage conveyor belt and the appellant was the person who placed the boxes in the scanning machine. There was no other person who was seen together with the appellant.

[15] Hence in the circumstances we do not see any error in the learned trial judge's finding of custody and control. Having found custody and control the

learned trial judge applied the statutory presumption of knowledge under s 37(d) to arrive at her conclusion of possession.

[16] In this connection we are not oblivious to the error committed by the learned trial judge on her deduction on the inference of knowledge based on the manner in which the proscribed drugs was concealed in the stainless steel flasks which appears in para 69 of her judgment at p 547 of the appeal record. Though the deduction was erroneous nevertheless in our view it does not necessarily follow that just because the proscribed drugs was so well hidden it must follow that he has knowledge. Nevertheless it is our considered view that the error aforesaid is not fatal to the prosecution's case as it does not affect the core of the prosecution's case. This is because there is the statutory presumption of knowledge under s 37(d)) as applied by the learned trial judge in para 68 at p 546 of the appeal record to establish possession.

[17] We would also add that the argument of the conduct of the appellant in not showing any sign of anxiety or attempting to run goes towards negativing knowledge is at best neutral as the place where the appellant was apprehended was a restricted area where there is no opportunity to escape.

[18] The quantity of the drugs being 12,133g clearly leads to the inference that it is not intended for personal consumption — *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

[19] On the basis of the evidence as outlined above it is our considered view that the learned trial judge was correct in her conclusion that a prima facie case of trafficking has been made out by the prosecution at the close of the prosecution's case.

[20] Having being satisfied that a prima facie case has been made out the learned judge embarked upon analysing the defence evidence to ascertain the appellant's defence of innocent carrier.

[21] It is imperative to remind ourselves that the success or otherwise of the defence of innocent carrier revolves round issues of facts which are invariably within the realm of the trial judge to determine. An appraisal of her written grounds clearly shows that the learned trial judge had addressed her mind to the defence of innocent carrier before concluding that the defence in the factual matrix failed to raise any reasonable doubt.

[22] The learned trial judge gave serious consideration to the character Sulaiman raised by the appellant before arriving at her finding that Sulaiman was a fictitious character created by the appellant to prop up his defence of innocent carrier. The judge referred to the conduct of the appellant in not

having any suspicion to enquire as to the contents of the boxes handed to him by a person whom he had only met for five days.

[23] In this connection it is to be noted that there was no suggestion by the defence that the appellant had enquired from the person who handed the two boxes to him the contents thereof nor was such suggestion made to the prosecution's witnesses. The failure to do so would invariably attract the concept of wilful blindness more so when the learned trial judge at para 104 at pp 558–559 of the appeal record found it rather illogical for the appellant not to have been given the name address and telephone number of the person in Penang who was supposed to collect the boxes from him but instead gave his telephone number to Sulaiman to convey same to the person in Penang.

[24] As found by the learned trial judge the appellant was in a position to examine the contents of the boxes entrusted by Sulaiman at the airport in New Delhi before it was checked in but he failed to do so which led the learned trial judge to make the inference that the appellant knew the contents of the boxes he was carrying. In our view this further justifies the applicability of the concept of wilful blindness — see para 103 at p 558 of appeal record.

[25] The contradictory oral evidence of the appellant of the sum of RM300 handed to him by Sulaiman for customs duty on the stainless steel flask in exhs P6, P12 and P13 which was in total variance with his cautioned statement in D75 where he stated that the amount was for carrying the aforesaid three exhibits was another factor that weighed heavily in the learned trial judge's mind which led her to reject the defence of innocent carrier.

[26] The aforesaid evaluation by the learned trial judge of the defence and the totality of the evidence presented at the close of the defence to our mind satisfies the maximum evaluation standard required of her. We would like to emphasise that in approaching the question of maximum evaluation of particular importance is not the label but rather the substance. In the factual matrix herein we are satisfied that the learned trial judge did conduct a maximum evaluation through her in depth and thorough consideration and analysis of the evidence presented before arriving at her findings.

[27] We have no reason to disagree with the findings of the learned trial judge. There was no error made by the learned trial judge in the appreciation of the evidence presented before her. She was entitled to make the findings of fact which she did for the reasons given by her. We do not see any room or reason for appellate interference. The challenge by the defence is unmeritorious and is

A accordingly dismissed. We are satisfied that the conviction is safe. The appeal is accordingly dismissed and the conviction and sentence of the High Court affirmed.

Appeal dismissed; conviction and sentence of High Court affirmed.

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Reported by Ashgar Ali Ali Mohamed

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